

REVISED DRAFT

March 5, 1991

Dear :

This responds to your recent letter concerning the Environmental Protection Agency's possible designation of environmental tobacco smoke ("ETS") as a Group A carcinogen. [The specific issue you have raised concerns the impact such a designation may have on {name of company}'s current policies regarding smoking in the workplace.] We appreciate your contacting us for information on the subject.

Staff at the Environmental Protection Agency ("EPA") currently are working on three documents relating to ETS -- an ETS Risk Assessment, a Workplace Policy Guide, and a so-called "Technical Compendium" on ETS. Contrary to many press reports, none of these documents have yet been completed. In fact, a Science Advisory Board ("SAB") panel was convened in December 1990 to review the Risk Assessment and Policy Guide drafts and was highly critical of both documents. Substantial revisions to the drafts have been called for by the SAB members.

Although a number of the SAB panel members tentatively endorsed the proposed Group A designation of ETS, the panel members also emphasized that the issue of whether such a designation could be sustained will remain open until the further analyses called for by the panel have been completed. The panel also requested that the drafts be subjected to a second review after revisions in accordance with the panel's recommendations have been made. We continue to believe strongly that the proposed Group A classification of ETS is unjustified by the scientific studies that have been conducted to date. Further analyses, as called for by the SAB panel, should demonstrate the correctness of our position.

It now appears that the EPA staff will not be able to complete work on the ETS documents described above before the summer of 1991, at the earliest. Whatever the outcome of the EPA's deliberations, however, several points should be borne in mind as the EPA review continues.

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First and foremost is the fact that EPA has no regulatory authority with respect to indoor air generally or ETS. In fact, Congress has considered proposals to give EPA regulatory authority with respect to indoor air issues and specifically declined to do so. The only federal agency that possesses general regulatory authority concerning indoor air in the workplace is the Occupational Safety and Health Administration ("OSHA").

On at least two occasions during the past several years, OSHA has considered and rejected petitions to ban or severely restrict smoking in the workplace. In connection with the most recently completed proceeding, OSHA concluded that "the currently available data are not sufficiently definitive" to support such measures. (Letter from Assistant Secretary, Occupational Health and Safety Administration, U.S. Dept. of Labor, to John P. Banzhaf, III, Action on Smoking and Health (Sept. 1, 1989)).

In a November 30, 1990 letter, the Administrator of OSHA similarly informed Action on Smoking and Health (an anti-smoking group) that "OSHA is not prepared, at the present time, to initiate rulemaking on ETS, although a final decision whether and how, to proceed has not been reached." In December 1990, OSHA announced that it intended to issue -- sometime in the spring of 1991 -- a request for information covering a host of indoor air issues, including ETS. The options that would be available to OSHA thereafter range from the initiation of a regulatory proceeding on indoor air quality in general, which would not be limited to ETS, to reaffirmation of current OSHA policies, which do not include regulation of workplace smoking other than in connection with asbestos exposure. (See 29 C.F.R. § 1910 et seq., § 1926 et seq.).

The second point that needs to be made in connection with the EPA's proposed designation of ETS as a Group A carcinogen is that it does not purport to define the extent of any hazard in real life conditions. Nor does an EPA classification establish the existence of a hazard in the workplace. So far as the workplace is concerned, such determinations are, as already noted, within the purview of OSHA rather than the EPA.

Moreover, it is by no means certain that the EPA will decide ultimately to affix a Group A label to ETS. The EPA staff's initial effort to do so was based largely upon epidemiologic studies focusing on the lung cancer incidence of women married to smokers. Scientists have pointed out in written comments to the EPA, however, that the slightly

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elevated incidence of lung cancer reported in a number of such studies has generally not reached statistical significance, and falls in most cases within the range of variation inherent in epidemiology. The available studies also relate primarily to populations outside the United States, which raises a series of difficult extrapolation issues. In addition, scientific submissions to the EPA have pointed out that none of the seven studies that have focused on the workplace has found an elevated incidence of nonsmoker lung cancer associated with workplace smoking. 13

Finally, the proposed classification of ETS by the EPA would have only limited legal effect -- if it had any effect at all. We already have pointed out that OSHA has not enacted any general regulation pertaining to ETS. OSHA's general position so far as workplace smoking is concerned has also been described above. We are not aware of any other regulatory scheme or mechanism, either federal or state, that would be triggered directly by a Group A classification.

The treatment of workplace smoking under state workmen's compensation and common law theories is described in the article that is enclosed -- entitled "Smoking in the Workplace: Accommodating Diversity" -- which appeared in the July, 1989 edition of the Labor Law Journal and was reprinted in the Human Resources Yearbook: 1990 Edition. As pointed out by the author of that article, a leading labor law practitioner, neither the courts nor workmen's compensation tribunals have been particularly hospitable to efforts to interfere with workplace smoking policies that comply with applicable state and local statutes and otherwise are designed to accommodate fairly both smokers and nonsmokers. The article also describes in some detail an accommodation approach that has worked well for countless companies, large and small.

We hope that we have responded adequately to your request. Please feel free to let us know, however, should you need further elaboration of any of the points we have made.

Attachment

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